K Sila Dass (Susulin @ M Siladoss) v Alliance Bank Malaysia Bhd & Ors and other suits

HIGH COURT (KUALA LUMPUR) — SUIT NOS S-23–100 OF 2007, S-23–101 OF 2007 AND S-23–102 OF 2007
LAU BEE LAN J
7 JUNE 2012

Tort — Damages — Defamation — Written complaints to Disciplinary Board — Whether contained personal defamatory remarks — Whether written out of malicious intent — Elements of tort of libel — Whether contents of letters of complaint defamatory — Whether contents of letters of complaint published to third parties — Qualified privilege — Whether publication malicious

The plaintiff brought an action of damages for libel against the defendants, in his capacity as a partner of the legal firm, Messrs K Sila Dass & Partners ('the firm'). The first defendant was a licensed financial institution while the second and third defendants were the first defendant's senior executive, credit administration hub and assistant general manager, respectively. The firm was appointed by the defendants to handle and manage all loan security documentation in respect of the transaction of three borrowers, namely Iswaraseelan a/l Elangovan ('Iswaraseelan'), Chan Yuet Yeng ('Chan Yuet Yeng') and Mohd Zawawi bin Awang ('Zawawi'). When the plaintiff did not return the three borrowers' security documents to the first defendant, the latter lodged written complaints to the Advocates & Solicitors Disciplinary Board. These letters of complaint were signed by the second and third defendant. The plaintiff contended that the letters of complaint contained personal defamatory remarks and that the first defendant acted maliciously in issuing the letters of complaint. The defendants however averred that the plaintiff failed to establish the elements of the tort of libel. It was further argued that the words used in the letters of complaint referred to the firm and not the plaintiff personally; the statements made in the letters of complaint were not defamatory in nature; and the letters of complaint were issued on an occasion of qualified privilege and malice was absent on the part of the defendants. Before the court, the issues for adjudication were whether the contents of the letters of complaint were defamatory of the plaintiff; whether the contents of the letters of complaint were published to third parties; whether each of the occasions of the publication of the letters of complaint was on occasion of qualified privilege; and if each of the occasions of the publication of the letters of complaint was an occasion of qualified privilege, whether the publication of the same was malicious.

Held, dismissing the suits with costs to be taxed:

(1) The letters of complaint must be construed in their entirety and in

context. However having considered the letters of complaint in its entirety and in context, the argument of the defendants were tenuous, unreasonable and unacceptable (see para 39).

(2) It could be presumed that there was publication as the letters of complaint were not marked private and confidential and in the ordinary course of events would be opened by clerks or secretaries (see para 44).

(3) The plaintiff's contention that the defendants had not pleaded the publication of the letters of complaint to the Bar Council and to M/s Leong Yeng Kit & Co were covered by the defence of qualified privilege was misplaced (see para 45).

(4) The defendants had a duty to lodge a complaint against the firm as there were serious allegations of fraud that involved the firm. There was nothing sinister for the first defendant being an aggrieved party and a victim of fraud perpetrated by the firm to do so. Under the LPA, the firm, being a legal firm was governed by the disciplinary board whose duty is to discipline lawyers. Hence the disciplinary board had a corresponding interest or duty to receive the defendants' complaint. Therefore the letters of complaint were issued on an occasion of qualified privilege (see para 49).

(5) The plaintiff failed to establish malice on the defendants' part. The defendants investigated the matter thoroughly to ascertain the identity of the true culprit before issuing the letters of complaint. There was justification for the letters of complaint to be copied to the Bar Council and Messrs Leong Yeng Kit & Co by the first defendant. The letters of complaint were bona fide made in the true belief that a fraudulent conduct had taken place in the firm which had resulted in losses to the defendants (see para 51–53).

[Bahasa Malaysia summary

Plaintif membuat tindakan menuntut ganti rugi untuk libel terhadap defendan-defendan, dalam kapasitinya sebagai rakan kongsi firma guaman, Tetuan K Sila Dass & Partners ('firma'). Defendan pertama merupakan institusi kewangan berlesen manakala defendan kedua dan ketiga, masing-masing merupakan eksekutif kanan, pusat pentadbiran kredit dan penolong pengurus besar. Firma dilantik oleh defendan-defendan untuk mengendalikan dan menguruskan semua dokumentasi pinjaman sekuriti berhubung transaksi tiga peminjam, iaitu Iswaraseelan a/l Elangovan ('Iswaraseelan'), Chan Yuet Yeng ('Chan Yuet Yeng') dan Mohd Zawawi bin Awang ('Zawawi'). Apabila plaintif tidak memulangkan ketiga-tiga dokumen sekuriti kepada defendan pertama, defendan pertama membuat aduan bertulis kepada Lembaga Disiplin Peguamcara dan Peguambela. Surat-surat aduan ini ditandatangani oleh defendan kedua dan ketiga. Plaintif menghujah bahawa surat-surat aduan tersebut mengandungi kenyataan fitnah bersifat peribadi

dan bahawa defendan pertama bertindak dengan niat jahat dalam mengeluarkan surat-surat aduan tersebut. Defendan bagaimanapun menghujah bahawa plaintif gagal untuk membuktikan elemen-elemen tort libel. Seterusnya, dihujahkan bahawa perkataan-perkataan yang digunakan dalam surat-surat aduan merujuk kepada firma dan bukannya kepada plaintif secara peribadi; penyataan-penyataan yang dibuat dalam surat-surat aduan tidak bersifat fitnah; dan surat-surat aduan tersebut dikeluarkan pada keadaan di mana tiada perlindungan bersyarat dan niat jahat bagi pihak defendan-defendan. Di hadapan mahkamah, isu-isu untuk diputuskan ialah sama ada kandungan surat-surat aduan adalah fitnah terhadap plaintif; sama ada kandungan surat-surat aduan diterbitkan kepada pihak ketiga; sama ada pada setiap keadaan penerbitan surat-surat aduan tersebut pada keadaan perlindungan bersyarat; dan sekiranya setiap keadaan penerbitan surat-surat aduan tersebut adalah pada keadaan perlindungan bersyarat, sama ada penerbitan surat tersebut adalah berniat jahat.

Diputuskan, menolak guaman dengan kos yang dikenakan dicukai:

(1) Surat-surat aduan mestilah ditafsirkan secara keseluruhan dan mengikut konteks. Walau bagaimanapun, setelah mempertimbangkan surat-surat aduan secara keseluruhan dan mengikut konteksnya, hujah defendan-defendan adalah lemah, tidak munasabah dan tidak boleh diterima (lihat perenggan 39).

(2) Boleh diandaikan bahawa terdapat penerbitan surat-surat aduan yang tidak ditandakan sebagai sulit dan persendirian dan pada kebiasaannya boleh dibuka oleh kerani-kerani atau setiausaha-setiausaha (lihat perenggan 44).

(3) Hujah plaintif bahawa defendan-defendan tidak memplid penerbitan surat-surat aduan kepada Majlis Peguam dan kepada Tetuan Leong Yeng Kit & Co telah terangkum oleh pembelaan bahawa perlindungan bersyarat tidak kena pada tempatnya (lihat perenggan 45).

(4) Defendan-defendan mempunyai kewajipan untuk melaporkan aduan terhadap firma sekiranya terdapat tuduhan penipuan serius yang melibatkan firma. Tidak salah bagi defendan pertama sebagai pihak terkilan dan mangsa penipuan yang dilakukan oleh firma untuk berbuat demikian. Di bawah APU, firma tersebut, merupakan sebagai sebuah firma guaman yang ditadbir oleh badan disiplin, dan kewajipan badan tersebut adalah untuk mendisiplinkan peguam-peguam. Oleh itu, lembaga disiplin mempunyai kepentingan yang sama atau kewajipan untuk menerima aduan defendan-defendan. Oleh itu, surat-surat aduan dikeluarkan pada keadaan kepentingan bersyarat (lihat perenggan 49).

(5) Plaintif gagal untuk membuktikan niat jahat bagi pihak defendan-defendan. Defendan-defendan menyiasat perkara tersebut

dengan teliti bagi memastikan identiti dalang yang sebenar sebelum mengeluarkan surat-surat aduan. Terdapat justifikasi untuk surat-surat aduan dibuat salinan dan diberikan kepada Majlis Peguam dan Tetuan Leong Yeng Kit & Co oleh defendan pertama. Surat-surat aduan dibuat secara bona fide dengan kepercayaan penuh bahawa tindakan penipuan berlaku di firma yang mengakibatkan kerugian kepada defendan-defendan (lihat perenggan 51–53).]

Notes

For cases on defamation, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 209–231.

Cases referred to

Albert Chew v Hong Leong Finance Bhd [2001] 4 MLJ 497, HC (refd)
Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315, HC (folld)
Hussein v Khan (folld)
Lembaga Tatatertib Peguam-Peguam v Hoo Lin Coln & Anor [2008] 4 MLJ 1, FC (folld)
Meyer And Company v Faber (No 2) [1923] 2 Ch 421, CA (refd)
Prism Leisure Sdn Bhd v Lumut Marine Resort Bhd [2002] 5 CLJ 391, HC (refd)
S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173, SC (refd)

Legislation referred to

Companies Act 1965
Legal Profession Act 1976 ss 57(b), (c), 99, 100, 101, 102, 103,103A, 103B, 103C, 103D

Prakash Lachimanan (Geetha Supramaniam with him) (Supramaniam & Sivashanmugam) for the plaintiff.
Dhinesh Bhaskaran (Sheila Ramalingam with him) (Shearn Delamore & Co) for the defendants.

Lau Bee Lan J:

BACKGROUND

[1] In this action, the plaintiff, a partner of the legal firm, Messrs K Sila Dass & Partners ('the firm') has sued the defendants for damages for libel. The first defendant is a licensed financial institution incorporated under the Companies Act 1965. At the material time the second defendant was the senior executive, credit administration hub of the first defendant and the third defendant was the assistant general manager of the first defendant.

[2] The first defendant appointed the firm to handle and manage all security documentation in respect of three borrowers, namely Iswaraseelan a/l Elangovan ('Iswaraseelan'), Chan Yuet Yeng ('Chan Yuet Yeng') and Mohd Zawawi bin Awang ('Zawawi').

[3] By orders dated 4 May 2009 and 29 January 2009, Civil Suit No S4–23–101 of 2007 in relation to the Chan Yuet Yeng transaction and Civil Suit No S1–23–102 of 2007 in relation to the Zawawi transaction were consolidated and ordered to be heard together with Civil Suit No S5–23–100 of 2007 in relation to the Iswaraseelan transaction.

[4] Since the three suits involve substantially the same facts and issues, I shall for purposes of this grounds of judgment deal only with the Iswaraseelan transaction and where necessary, make reference to the material differences in the other two transactions.

[5] By letters both dated 7 July 2006, the first defendant issued letters of complaint to the Advocates and Solicitors Disciplinary Board in relation to the Iswaraseelan transaction (bundle B pp 109–114) and to the Chan Yuet Yeng transaction (bundle B pp 258–263); and in respect of the Zawawi transaction, the letter of complaint was dated 9 September 2006 (bundle B pp 341–344). These letters of complaint were signed by the second defendant and the third defendant.

[6] The plaintiff alleges that (a) the letters of complaint contains remarks that are defamatory of the plaintiff personally; and (b) the first defendant acted maliciously in issuing the letters of complaint.

[7] The defendants' defence is that the plaintiff has failed to establish the elements of the tort of libel in that:

(a) the words used in the letters of complaint referred to the firm and not the plaintiff personally;

(b) the statements made in the letters of complaint were not defamatory in nature; and

(c) if the court finds the tort of libel has been established, the defendants contend that the letters of complaint were issued on an occasion of qualified privilege and there is absence of any malice on the part of the defendants.

ISSUES

[8] The issues to be tried are as per the agreed issues to be tried ('F'):

(1) Whether the contents of the letters dated 7.7.2006 and 9.9.2006 ['the letters of complaint'] are defamatory of the Plaintiff.

(2) Whether the contents of the letters of complaint were published to third parties.

(3) Whether each of the occasions of the publication of the letters of complaint was on occasion of qualified privilege.

[9] An additional issue is, if following issue (3), there is a finding that each of the occasions of the publication of the letters of complaint was an occasion of qualified privilege, whether the publication of the same was malicious.

WITNESSES

[10] The plaintiff (PW1) was the sole witness whilst the defendants called three witnesses (i) Mr Low Chan Keong, the assistant vice president, credit administration hub, consumer banking of the first defendant, (ii) the second defendant, Lim Sen Chea (DW2); and (iii) the third defendant, Damien Lee Siew Cheng (DW3).

FACTS

[11] The undisputed facts of the case essentially are as follows. Iswaraseelan, Chan Yuet Yeng and Zawawi were desirous of purchasing their respective property from Gopal s/o Rengasamy and G Karunamuthygandy s/o Gopal, Chan Yuet Yeng and Hoong Siang Soon and Pamela Keatrherleen a/p Maria Francis and Segaran a/l Muniandy (as the *pemegang kuasa* (probate/executor 1)('vendors') respectively. In order to do so, Iswaraseelan, Chan Yuet Yeng and Zawawi wished to obtain a loan from the first defendant for the purpose of funding the purchase of their respective property.

[12] All the sale and purchase agreements were prepared by the firm, namely:

(a) between Iswaraseelan and the vendors dated 11 December 2002 (bundle B pp 1–13);

(b) between Chan Yuet Yeng and the vendors dated 1 August 2003 (bundle B pp 121–133); and

(c) between Zawawi and the vendors dated 25 September 2003 (bundle B pp 272–284).

[13] Vide letters dated 11 June 2003, 3 October 2003 and 9 October 2003, the first defendant appointed the firm to handle and manage all loan and security documentation in respect of the Iswaraseelan transaction, Chan Yuet Yeng transaction and Zawawi transaction (bundle B pp 18–19, pp 138–139 and p 289) respectively.

[14] The firm was required specifically to carry out on behalf of the first defendant, work such as withdrawal of caveats, discharge of existing charges, registration of the transfer of the respective property and registration of the charge by Iswaraseelan (bundle B pp 104–105), Chan Yuet Yeng (bundle B pp 187–188) and Zawawi (bundle B pp 336–337).

[15] The firm accordingly prepared the charge documents comprising the following on behalf of the first defendant in order for the respective property to be charged in favour of the first defendant:

(a) the facilities agreement dated 17 June 2003 in the Iswaraseelan transaction (bundle B pp 20–63);

(b) Form 16A (bundle B pp 64–67, 141–144 and 290–293) in the Iswaraseelan transaction, Chan Yuet Yeng transaction and the Zawawi transaction respectively; and

(c) annexure to charge (bundle B pp 68–100, 145–179 and 294–332) in the Iswaraseelan transaction, Chan Yuet Yeng transaction and the Zawawi transaction respectively.

[16] By letters dated 24 June 2003, 6 January 2004 and 15 October 2003 (bundle B pp 104–105, 187–188 and 336–337) in the Iswaraseelan transaction, Chan Yuet Yeng transaction and the Zawawi transaction respectively, the firm:

(a) confirmed that the works that they were appointed to carry out had been completed and furnished the first defendant with the presentation numbers of the documents presented for registration at the land office;

(b) confirmed that as soon as the registration of the transfer in favour of Iswaraseelan, Chan Yuet Yeng and Zawawi and the charge in favour of the first defendant is completed at the land office, the said documents are valid and enforceable under the laws of Malaysia and therefore the first defendant's interests are fully safeguarded and protected;

(c) the firm furnished to the first defendant, amongst others, a copy of the presentation statement containing details of the documents purportedly presented by the firm at the land office (bundle B p 103, pp 189–190 and pp 334–335) in the Iswaraseelan transaction, Chan Yuet Yeng transaction and the Zawawi transaction respectively; and

(d) the firm stated that the works had been completed; it was safe for the first defendant to disburse the principal sum to the firm as the vendor's stakeholder. The firm also undertook to forward the original title and duplicate charge in respect of the respective property to the first defendant upon extraction of the same from the land office.

[17] Relying on the firm's representations as contained in the letters dated 30 June 2003 and 29 October 2003 (bundle B p 106 and p 338) in respect of the Iswaraseelan transaction and the Zawawi transaction respectively and 6 January 2004 in respect of the Chan Yuet Yeng transaction, the first defendant disbursed the principal sum to the firm.

[18] Thereafter, the first defendant repeatedly contacted the firm to ask for the return of the security documents, including the original document of title, the memorandum of transfer and the duly registered charge in favour of the first defendant (WSDW1 Q&A(s) 19, 38 and 58).

[19] However on each occasion the firm informed the first defendant that the documents had yet to be returned or extracted from the land office and repeatedly assured the first defendant that the firm will furnish these documents to the first defendant as the firm received the same from the land office. Despite numerous reminders by the first defendant, the documents were never returned to the first defendant. Suspecting something was amiss the first defendant sought confirmation from the land office as to the status of the security documents (WSDW1 Q&A 39 and the letter dated 18 July 2005 from the first defendant to the land office in the Chan Yuet Yeng transaction (bundle B pp 191–192); WSDW1 Q&A 59 in the Zawawi transaction).

[20] The land office informed the first defendant that the presentation slips given to the first defendant by the firm was not issued by the land office (WSDW1 Q&A 40) and the letter dated 20 October 2005 from the land office in the Chan Yuet Yeng transaction (bundle B p 193); WSDW1 Q&A 60 in the Zawawi transaction).

[21] The first defendant then wrote several letters dated 28 November 2005 (bundle B p 340), 16 March 2006 and 17 April 2006 (bundle D pp 1 and 3 respectively) to the firm demanding for an explanation. In re-examination the second and third defendants testified they went to the firm's office on 20 March 2006 (as per appointment stated in the letter dated 16 March 2006) to look at the relevant files but were made to wait and were not entertained.

[22] Even when the plaintiff's counsel was allowed to ask fresh questions of the second defendant (DW2) (as learned counsel was not aware that Tammy Lim referred to the second defendant), limited to whether the second and third

defendants kept up with their appointment on 20 March 2006, the second defendant's reply to the Q&A(s) are as follows:

(Q:) Was this appointment with Mr. K. Sila Dass and Cik Azlinda?

(A:) We were there. The clerks asked us to wait. Waited until lunch time.

Did not meet Mr. K S Dass or Azlina.

Did not make further appointment.

Called by phone to follow up.

After the visit on 20.3.2006, they promised to forward the presentation slip by 20.4.2006 (p.3).

(Q:) Did you attempt to call and speak to either of the partners of the Firm?

(A:) We could not get hold of any of the partners. Everytime we call, we are told that they are not in. They put us to somebody else.

[23] The firm's response to the first defendant's queries was that the firm's despatch clerk had mistakenly presented documents and forwarded different sets of presentation receipts not related to the transactions. The firm had advised the land office to retract the document presented and duly resubmitted the same for presentation and the firm would extract the original title deed and the original presentation receipts as soon as possible (firm's letter dated 20 December 2005 (bundle B p 195) and the firm's letter dated 12 April 2006 (bundle D p 2)).

[24] However the security documents were still not returned to the first defendant the first defendant then instructed its former solicitors, Messrs Leong Yeng Kit & Co, to issue a letter of demand to the firm for the return of these documents. By a letter dated 17 May 2006, Messrs Leong Yeng Kit issued a letter of demand to the firm (bundle D pp 4–5, 6–7 and 8–9) in respect of the Iswaraseelan transaction, Chan Yuet Yeng transaction and the Zawawi transaction respectively. The said letter basically stated, inter alia:

(a) the firm had fraudulently and/or negligently advised the first defendant to release the balance loan sum to the firm;

(b) the firm had furnished the first defendant with a false statement of presentation from the land office; and

(c) the land office has advised the first defendant that none of the items of presentation together with the presentation numbers had been presented at the land office for registration and the presentation numbers given by the firm were either false or belonging to other titles.

[25] Vide a letter dated 26 May 2006, the firm informed Messrs Leong Yeng

Kit & Co (i) that the security documents had been misplaced at the land office as the same were presented by a freelance despatch clerk who produced false presentation slips; (ii) the firm was in the midst of making arrangement to extract the said titles and documents and to forward the same to them; and (iii) the firm 'sincerely write to inform you that we are doing all the necessary efforts to rectify the mistake in respect of the abovesaid files'.

[26] To date the first defendant has not received any of the security documents in respect of the Iswaraseelan transaction, and only some documents in the Chan Yuet Yeng transaction and the Zawawi transaction as reflected in the firm's letter dated 26 May 2006 (bundle B pp 196–197) and Messrs Leong Yeng Kit & Co's response dated 29 May 2006 (bundle D pp 10–11).

[27] Subsequently, Iswaraseelan, Chan Yuet Yeng and Zawawi defaulted on the loan facility. Due to the lack of security documents, the first defendant is unable to initiate foreclosure proceedings and sell the respective property to recover its losses.

[28] Upon the advice of Messrs Leong Yeng Kit & Co, the first defendant lodged the letter of complaint dated 7 July 2006 against the firm with the Disciplinary Board ('the DB') (bundle B pp 109–114, 258–263 arid 341–344) in the Iswaraseelan transaction. The heading in the letter of complaint in the Iswaraseelan transaction reads as follows:

> Re: Letter of Complaint to the Advocates and Solicitors Disciplinary Board
>
> Accused: *Mr. K. Sila Dass and all other partners practicing in the name and style of Messrs. K. Sila Dass & Partners of No.8A-4, Tingkat 3, Jalan 14/20, 46100 Petaling Jaya, Selangor D.E.*
>
> Complainant: Alliance Bank Malaysia Berhad (Company No.88103-W)
>
> Property: GRN 48913 (formerly known as Geran 14777) Lot 144, Seksyen 30, Bandar Klang, Negeri Selangor D.E.
>
> (Emphasis added.)

[29] Similar letters of complaint of even date were lodged in the Chan Yuet Yeng transaction and the Zawawi transaction) (bundle B pp 258–263 and 341–344) respectively. The heading in the Chan Yuet Yeng transaction and the Zawawi transaction is similar except for the particulars on the description on 'property' where the 'property' is described respectively as:

> PN 1604, Lot 35948, Mukim of Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan Kuala Lumpur.; and

A No. PN 6414, Lot 771, Seksyen 5, Bandar Petaling Jaya, Daerah Petaling, Negeri Selangor D.E.

[30] Azlinda bt Zakariah, a partner of the firm:

B (a) lodged police reports dated 18. October 2006 in the Iswaraseelan transaction and the Chan Yuet Yeng transaction (bundle B pp 115–116 and 264–265 respectively) and in the Zawawi transaction, the police report was lodged on 13 September 200 (bundle B pp 345–346);

C (b) issued letters of explanation all dated 17 November 2006 in the Iswaraseelan transaction, the Chan Yuet Yeng transaction and the Zawawi transaction (bundle B pp 118–120, 266–268 and 348–350 respectively); and

D (c) stated therein, inter alia, as follows:

(i) The Firm's former managing clerk, one Manoharan a/l Dorasamy ('Manoharan') and the Firm's former conveyancing clerk, one Luna Reflizan ('Luna'), had conspired and acted fraudulently in not presenting the security documents for registration, and had concealed this fact from her.

E

(ii) Manoharan had falsely advised the first defendant with fictitious presentation numbers prepared by Luna, to release the loan sum to the Firm, which the first defendant did.

F

(iii) Manoharan had since absconded and cannot be contacted, while Luna had resigned at short notice.

(iv) The Firm confirms and undertakes to ensure that the first defendant's interest is protected and that the Firm shall assist and co-operate in any manner appropriate in the circumstances.

G

[31] The plaintiff also issued letters of explanation all dated 20 November 2006 in the Iswaraseelan transaction (bundle D pp 15–17), the Chan Yuet Yeng transaction and the Zawawi transaction (bundle B pp 266–268 and 348–350 respectively) stating, inter alia, the following:

H

(i) The plaintiff was not aware of this transaction and the matters referred to by the first defendant as the transaction was handled by Azlinda bte Zakaria.

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(ii) According to Azlinda Bte Zakaria, Manoharan and Luna had conspired to commit fraud and had in fact done so.

(iii) The plaintiff confirms that the Firm will do whatever is necessary and take appropriate actions to protect the first defendant's interests.

A

FINDINGS OF THE COURT

The law

B

[32] It suffices for me to state that the law is trite in that in an action for libel, the burden of proof lies on the plaintiff to prove:

(a) the words are defamatory;

(b) the words refer to the plaintiff; and C

(c) the words were published.

Support for this proposition is the case of *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315 (HC) at p 316.

D

WHETHER DEFAMATORY OF THE PLAINTIFF?

Whether the words refer to the plaintiff? (first issue)

E

[33] Both the plaintiff and defendants stand on common ground in that the letters of complaint ought to be read in its entirety. However the plaintiff relies to a great extent on paras 19–20 of the letter of complaint involving the Iswaraseelan transaction and paras 20–21 of the letter of complaints involving the Chan Yuet Yeng transaction and the Zawawi transaction respectively and contends when read in their entirety, the word 'accused' is reference made to the plaintiff. The defendant submits when taken in their proper context and entirety, the words stated in the letters of complaint are not defamatory of the plaintiff. F

G

[34] Throughout the letters of complaint, the word 'accused' is used. According to the heading of the letters of complaint, the word 'accused' is referred to as 'Mr K Sila Dass and all other partners practicing in the name and style of Messrs K Sila Dass & Partners of No.8A-4, Tingkat 3, Jalan 14/20, 46100 Petaling Jaya, Selangor D.E.'. H

[35] A partnership consists of all the partners of a firm. A firm is not generally recognised as an entity distinct from the partners composing it (*Meyer And Company v Faber (No 2)* [1923] 2 Ch 421. It is not denied based on paras 4, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17 and 18 of the letters of complaint read along with the definition of 'accused' as per the heading, the word 'accused' and the exhibited documents refer to 'the firm' as is defined in the heading of the letters of complaint. I

[36] The aforementioned paragraphs are reproduced as follows for purposes of clarity:

(i) Paragraph 4

'At the material time of the Sale and Purchase Agreement, the Accused was supposed to have protected the interest of the Complainant Bank by …'

(ii) Paragraph 6

'Borang 16A and the 1st Part Charge Annexure (hereinafter referred to as the Charge documents) had been prepared by the Accused, had been executed by the Complainant Bank and the Borrower AND had been duly stamped on 17.6.2003 …'

(iii) Paragraph 7

'To date, there is no evidence to show that the Accused had prepared a duly executed and registrable Memorandum of Transfer, any documents to discharge the previous charge and/or release the private caveat.'

(iv) Paragraph 8

'On or about 24.6.2003, the Accused had in writing informed the Bank that the Accused had duly presented the following documents in the Shah Alam Land Office …'

(v) Paragraph 9

'The Accused had also vide their same letter of advise dated 24.6.2003 (hereinafter referred to as the 'Letter of Advise Release'), advised the Complainant Bank to release the Balance Loan Sum …'

(vi) Paragraph 10

'As purported proof that the said presentation for registration were made by the Accused, the Accused enclosed a Statement of Presentation purportedly issued by the 'Pejabat Tanah dan Galian Selangor' …'

(vii) Paragraph 11

'In reliance and based upon the Accused's Letter of Advise Release enclosing the False Presentation Statement issued by the Accused to the Complainant Bank, the Complainant Bank had on 30.6.2003 released the Balance Loan Sum of RM430,000 to the Accused as 'stakeholders' for the Vendor …'

(viii) Paragraph 13

'The Complainant Bank could not begin foreclosure proceedings as the Accused had yet to return the duly registered Security Documents to it. The Complainant Bank had demanded that the Accused return to it the duly registered documents for its further action but the Accused constantly delayed the return.'

(ix) Paragraph 14

'The Accused had on 14.11.2005 written to the Complainant Bank to state that the Original Title deeds …' A

(x) Paragraph 15

'Since the Complainant Bank could no longer wait for the Accused's continuous delay, the Complainant Bank had made a search on the relevant title that revealed that none of the items of presentation represented by the Accused had been registered on the title search.' B

(xi) Paragraph 16

'The Complainant immediately wrote to the Land Office on 18.7.2005 to confirm the presentation numbers as represented by the Accused in the False Presentation Statement.' C

(xii) Paragraph 17

'We had instructed our present Solicitors Messrs Leong Yeng Kit & Co. to demand that the Accused return the Original … and return of the loan sum … to the Complainant Bank but to date, the Accused has failed to return the same to the Complainant Bank.' D

(xiii) Paragraph 18

'To date the Accused continues to evade and delay the return of the Original title …'. E

[37] However a comparison has to be made of the aforementioned paragraphs with paras 19–20 (or the corresponding paras 20–21 as the case maybe) of the letters of complaint wherein the sting of the defamatory lies which read as follows: F

(19) The conduct of the Accused has clearly demonstrated the Accused's deliberated and criminal act in unjustly enriching himself (if any) or deceiving the Complainant and further demonstrated the lack of honesty in his practice as an Advocates and Solicitors of the High Court of Malaya. We are of the view that the Accused has further demonstrated conduct unbecoming of an honest practitioner of law at the Bar. G

(20) In the circumstances, we pray that the Accused be fined, and struck off the rolls of the Bar with immediate effect and that his name be published in the BAR Councils circulars to be brought to the attention of all other practitioners, Banks and other Financial Institutions. H

[38] In relation to paras 19–20 of the letters of complaint the defendant submits: I

(a) the references to the singular pronoun such as 'himself' and 'his' clearly refer to the singular noun 'Accused' which in turn refers to the firm;

(b) by operation of the word 'if any' in the sentence 'The conduct of the

Accused has clearly demonstrated the Accused's deliberated and criminal act in unjustly enriching himself (if any) …' (para 19), 'the first defendant merely states that the accused ie the firm may have unjustly enriched himself. The first defendant did not state as a matter of fact that the accused ie the firm did unjustly enrich itself. This is consistent with the fact that it is ultimately the DB's role to investigate the complaint and make a finding'; and

(c) prayer 20 merely prays for relief against the accused ie the firm and it is ultimately for the DB to decide whether the firm is guilty of misconduct within the meaning of the Legal Profession Act 1976 and if so, the appropriate punishment to be meted out against the firm.

[39] I am mindful that the letters of complaint must be construed in their entirety and in context (*Prism Leisure Sdn Bhd v Lumut Marine Resort Bhd* [2002] 5 CLJ 391 at pp 408–409. However having considered the letters of complaint in its entirety and in context, and I find the argument of the defendants with respect to paras 19–20 as tenuous, unreasonable and unacceptable. My reasons are as follows.

[40] It is in evidence that the first defendant lodged the letters of complaint upon the advice of M/s Leong Yeng Kit & Co and the letters of complaint were drafted by the said firm of solicitors. Consideration has to be given to particularly the following words used in paras 19–20:

(i) 'Accused's criminal conduct in using false and/or forged documents to deceive the Bank.';

(ii) 'The conduct of the Accused has clearly demonstrated the Accused's deliberated and criminal act in unjustly enriching or deceiving the Complainant.';

(iii) '… further demonstrated the lack of honesty in his practice as an Advocates and Solicitors of the High Court of Malaya.';

(iv) 'We are of the view that the Accused has further demonstrated conduct unbecoming of an honest practitioner of law at the Bar.';

(v) '…we pray that the Accused be fined, struck off the rolls of the Bar …' ('the impugned words')

[41] I find it hard to believe that the drafters of the letters of complaint being solicitors and not a lay person as such, would not be conscious of the fact that they are proceeding against the plaintiff and his partner and not the firm having regard to the fact:

(a) the defendants at para 26(iv) of the defence pleaded that the complaint is against the plaintiff and his partner; and

(b) pursuant to the LPA, a complaint can be lodged against an advocate and solicitor or a legal firm.

[42] In *Gatley on Libel and Slander* (9th Ed), at pp 29 and 56, the learned author stated that any imputation which tends to injure a person's reputation in a business or profession is defamatory.

[43] Thus, I agreed with the plaintiff's submission that the imputation of the impugned words in its natural and ordinary meaning means that the person referred to:

(i) has been charged in Court for a crime;

(ii) has committed a crime;

(iii) falsified or forged documents;

(iv) deceived the Bank;

(v) has benefited by unlawful or ill-gotten gains;

(vi) insincere or fraudulent;

(vii) guilty of a serious misconduct and is not fit to continue his practice as an advocate and solicitor.

(*Black's Law Dictionary* (8th Ed), at pp 402, 635, 677, 435, 1573 and 685).

Whether the words were published? (second issue)

[44] In this instant case it can be presumed that there is publication as the letters of complaint were not marked private and confidential and in the ordinary course of events would be opened by clerks or secretaries.

Whether the defence of qualified privilege applies? (third issue)

[45] The plaintiff's contention that the defendants have not pleaded the publication of the letters of complaint to the Bar Council and to M/s Leong Yeng Kit & Co were covered by the defence of qualified privilege is misplaced. I find the defendants had clearly pleaded in para 27 '… that each of the occasions of publication of the letter of 7 July 2006 was an occasion of qualified privilege.'

[46] The letters of complaint were written to the DB, the statutory body to whom complaints are made by clients on the professional conduct of an advocate and solicitor (s 99 of the LPA).

[47] Pursuant to the provisions of the LPA, the DB with the help of the

Investigating Tribunal and Disciplinary Committee ('DC') will investigate into the complaint and make recommendations to the DB. The DB will then make a decision affirming the recommendations of the DC and the punishment or in exceptional circumstances, impose a greater punishment (ss 100, 101, 102, 103, 103A, 103B, 103C and 103D of the LPA).

[48] From the police reports, letters of explanations and the testimony of the plaintiff, there is evidence that fraudulent conduct did in fact take place in the firm in that:

(i) the security documents were never presented for registration at the land office;

(ii) fictitious presentation numbers were prepared to hoodwink the 1st Defendant into releasing the balance loan sum to the Firm;

(iii) the first defendant did in fact release the balance loan sum to the Firm as stakeholder at the Firm's request without proper security in place;

(iv) to date, the Firm has not refunded the balance loan sum to the first defendant; and

(v) according to the plaintiff, fraudulent and false clients' accounts have been opened, into which the Firm's clients' monies have been deposited.

[49] I find the defendants had a duty to lodge a complaint against the firm as there are serious allegations of fraud that involved the firm. There is nothing sinister for the first defendant being an aggrieved party and a victim of fraud perpetrated by the firm to do so. Under the LPA the firm, being a legal firm is governed by the DB whose duty is to discipline lawyers. Hence the DB had a corresponding interest or duty to receive the defendants' complaint. Therefore the letters of complaint were issued on an occasion of qualified privilege (*S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173 (SC) at p 178C–E left column).

Whether the publication was malicious? (fourth issue)

[50] In order to negate the defence of qualified privilege, the onus is on the plaintiff to show malice on the part of the defendants (*S Pakianathan* at p 179C–I left column).

[51] I find the plaintiff has failed to establish malice on the defendants' part for two reasons:

(a) the defendants have investigated the matter thoroughly to ascertain the identity of the true culprit before issuing the letters of complaint; and

(b) there is justification for the letters of complaint to be copied to the Bar Council and Messrs Leong Yeng Kit & Co by the first defendant.

[52] I find based on the evidence which I have alluded to earlier, the defendants had investigated into the matter by (i) the first defendant repeatedly contacted the firm to ask for the return of the security documents; (ii) demanded for an explanation from the firm when the first defendant discovered that the presentation slips were fictitious. In fact prior to lodging the complaint, (i) the first defendant took the initiative to make inquiries at the relevant land offices; and (ii) the second and third defendants even went to the firm's office to look for the relevant files but were made to wait and were unattended to.

[53] The evidence revealed the identities of the culprits in the firm who were involved in the fraud, Manoharan a/l Dorasamy and Luna Reflizan were only made known to the defendants after the letters of complaint were lodged by the defendants. The fact there was a fraudulent conduct within the firm was admitted by the plaintiff.

[54] I find the letters of complaint were bona fide made in the true belief that a fraudulent conduct had taken place in the firm which had resulted in losses to the defendants (*Albert Chew v Hong Leong Finance Bhd* [2001] 4 MLJ 497 at p 508).

[55] In relation to the letters of complaint being copied to the Bar Council, there is no doubt that the first defendant had an interest and duty to notify the Bar Council and the Bar Council has a corresponding interest or duty to receive the letters of complaint. Support is found in s 57(b)–(c) of the LPA which reads:

57

(a) -

(b) to answer questions affecting the practice and etiquette of the profession and the conduct of members;

(c) to take cognizance of anything affecting the Malaysian Bar or the professional conduct of its members and to bring before any general meeting of the Malaysian Bar any matter which it considers material to the Malaysian Bar or to the interests of the profession and to make any recommendations and take any action as it considers fit in relation thereto.

[56] Further support of this proposition is the case of *Lembaga Tatatertib Peguam-Peguam v Hoo Lin Coin & Anor* [2008] 4 MLJ 1 where at pp 22–23 para 16 the Federal Court opined:

> It is therefore clear that it is the Bar Council that has been entrusted with the duty of maintaining the standard and conduct of advocates and solicitors and not the DB … In other cases warranting disciplinary action the DB acts on complaints made to it by, inter alia, the Bar Council. It is thus beyond doubt that the Malaysian Bar is the guardian of professional conduct and etiquette of advocates and solicitors.

[57] I find the defendants had an interest and duty to copy the letters of complaint to Messrs Leong Yeng Kit & Co as they were the solicitors then and the latter had a corresponding interest or duty to receive the letters of complaint in their capacity as solicitors for the defendants. The evidence showed Messrs Leong Yeng Kit & Co were fully aware of the facts and circumstances stated in the letters of complaint as they were (i) the solicitors who drafted the letters of complaint on behalf of the defendants; and (ii) had issued the letter of demand dated 17 May 2006 to the firm. In support I rely on the case of *Hussein v Khan [Lexis Nexis 21 of 44 Documents]* where the Court of Appeal held that publication of a letter alleged to contain defamatory statements against the plaintiff to the defendant's solicitor was not malicious publication.

CONCLUSION

[58] In the circumstances on a balance of probabilities I find the plaintiff has proven:

(a) the words in the letters of complaint refer to the plaintiff;

(b) the words in the letters of complaint are defamatory of the plaintiff;

(c) there was publication of the words in the letters of complaint;

(d) the letters of complaint were issued on an occasion of qualified privilege; and

(e) the plaintiff has failed to prove any malice on the part of the defendants as the defendants had acted bona fide and without malice.

[59] For the foregoing reasons the plaintiff's claims in all the three suits are dismissed with costs to be taxed unless otherwise agreed.

Suits dismissed with costs to be taxed.

Reported by Ibnu Aswan